IN THE

Supreme Court of the United States

October Term, 1957

No. 165

MAX LERNER, *Appellant*,

vs.

HUGH J. CASEY, WILLIAM G. FULLEN, HARRIS J. KLEIN, *et. al.*

APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF FOR NEW YORK CIVIL LIBERTIES UNION, *AMICUS CURIAE*

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Interest of New York Civil Liberties Union as *Amicus Curiae*

The New York Civil Liberties Union is submitting this brief with the written consent of both parties, filed with the Clerk of this Court. An affiliate of the American Civil Liberties Union, it is a non-partisan organization devoted solely to the protection and advancement of the constitutional liberties of the individual in situations arising in

New York City and its environs. Its exclusive concern is civil liberties; it has no other platform or program, political, economic, or otherwise.

The Union is concerned with the instant case because discharges from state employment on the basis of suspected beliefs and associations spread fear of the consequences of freely expressing opinions and freely associating, thus curtailing the exercise of vital First Amendment rights. Under the New York Court of Appeals' interpretation of New York's Security Risk Law, suspicion, fear and constraint are spread throughout all areas of state and city employment without regard for the Law's intended purpose of safeguarding security. Indeed, the application of the State Security Risk Law by the Court of Appeals to an employee whose "primary duties consisted of opening and closing subway car doors to permit the entrance and exit of passengers" (R. 6) finds no justification in the interest of "the security or defense of the nation and the state." Rather, it is destructive of the very interest sought to be protected. In our tradition liberty and security are complimentary, not opposing ideas. "Security is gained through liberty, rather than in opposition to it."[1] Moreover, a discharge from state or city employment based solely on the invocation of the privilege against self-incrimination is unfair, arbitrary and unreasonable. It is an abridgement of the important protection the privilege gives the individual against oppression and injustice.

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[1] *Report of the Special Committee on the Federal Loyalty-Security Program of the Association of the Bar of the City of New York*, 27 (1956).

Facts

Max Lerner, the appellant, was a subway conductor in the New York City transit system for nineteen years, most recently as an employee of the New York City Transit Authority (R. 6). During this period he performed his work to the satisfaction of the Transit Authority and the prior operators of the transit system (R. 6). On September 14, 1954 he was directed by his immediate superior to proceed to the office of the New York City Commissioner of Investigation. There, a deputy commissioner told him that he must answer questions "in an investigation," not more specifically defined, and that his failure to comply would cause his dismissal under 903 of the New York City Charter (R. 6-7). Lerner was then sworn and asked whether he was a member of the Communist Party (R. 10, 11). He declined to answer, relying upon his constitutional privilege. A similar inquiry and refusal occurred on October 8, 1954 when he appeared with counsel. The Deputy Commissioner refused to state whether charges had been made against him, but said that the inquiry was made under the State Security Risk Law (R. 6, 10-11). He was never furnished specifications or evidence to support a charge that he was or had been a Communist, or that, in any manner, "reasonable grounds exist for the belief that, because of doubtful trust and reliability [his] employment • • • in a security position or in a security agency would endanger the security or defense of the nation and the state" (R. 7-8). Nor did he ever receive a hearing in which evidence of any kind was presented against him (R. 9).

On October 21, 1954 appellant was suspended under the Security Risk Law on the sole ground of his reliance on

his constitutional privilege. He was given a thirty-day period in which to submit statements or affidavits in his own behalf. In the absence of specific charges and there being no dispute as to the assertion of the privilege, he made no submission (R. 10-11). Appellant was discharged from employment on November 24, 1954, because "upon all the evidence, reasonable grounds exist for belief that because of his doubtful trust and reliability, the employment of Max Lerner in the position of conductor endangers the security or defense of the nation and state" (R. 14-15). It is undisputed that in the position from which he was discharged Lerner's "primary duties consisted of opening and closing subway car doors to permit the entrance and exit of passengers, together with certain routine duties incidental thereto" (R. 6).

Issues to Be Argued by *Amicus*

We think it clear that the New York Security Risk Law, as applied to appellant by the holding of the Court of Appeals, was patently arbitrary and in violation of the due process clause of the Fourteenth Amendment, and that the discharge of a subway conductor whose primary duties consist of "opening and closing subway car doors" on the sole ground of his invocation of the privilege against self-incrimination was "arbitrary action" within the meaning of this Court's ruling in *Slochower* v. *Board of Education*, 350 U. S. 551.

I

The New York Security Risk Law, as Construed by the Court of Appeals, Is in Violation of Due Process of Law.

Under the "due process clause" it is well established that when a state undertakes to regulate what it is free to regard as a public evil, it may adopt such measures having a reasonable relation to that end as it may deem necessary in order to make its action effective. Putting to one side the question whether New York may, absent the element of *scienter*, constitutionally discharge a civil servant because of membership in the Communist Party, it is clear that *if* the New York Security Risk Law, as applied to appellant, bears no substantial relation to its purported objective of safeguarding "the security or defense of the nation and the state," the statute must fall. In short, if New York was not reasonably warranted in its conclusion that the retention in employment of a subway conductor of doubtful trust and reliability (occasioned by his invocation of the privilege against self-incrimination when asked whether he was a member of the Communist Party) would endanger the security or defense of the nation and the state, the statute cannot withstand a "due process" challenge. See *e.g.*, *Foster-Fountain Packing Co.* v. *Haydel*, 278 U. S. 1, 10-11, *Chastleton Corp.* v. *Sinclair*, 264 U. S. 543, 547-548.

This Court will note that New York specifically requires that no state or city employee may be employed or retained in employment if he is, or becomes, a member of an organization which advocates the overthrow of the Government of the United States by violence or unlawful means.

N. Y. Civil Service Laws, §12-a. This statutory provision, in force since 1939, is applicable to the employees of each and every agency of the City and State of New York. See, *Hughes* v. *Board of Education*, 309 N. Y. 319. Moreover, under §22 of the New York Civil Service Law an employee may be removed for cause after charges and hearing in accordance with the procedural requirements therein set forth. However, in *Adler* v. *Board of Education*, 342 U. S. 485, this Court recognized that §12-a of the New York Civil Service Law requires (1) a finding of *scienter* before an employee can be disqualified by reason of membership in a proscribed organization; (2) that the order of disqualification be supported by a fair preponderance of the evidence; (3) that the disqualified employee be permitted court review under the rules of evidence; and (4) that the burden of proof is upon the official seeking to sustain the order of disqualification. *Id.*, at pp. 494-496.

In contrast, the New York Security Risk Law authorizes the dismissal of state and city civil servants by reason of constitutionally protected activities and associations. There is no requirement that there be a finding as to *scienter;* mere "membership in any organization or group found by the State Civil Service Commission to be subversive" is sufficient (*N. Y. Uncon. Laws*, §1107(d)). The State Civil Service Commission is not required to base its determination as to whether an organization or group is "subversive" upon evidence developed in hearings conducted by it; it is permitted to rely on the findings of other agencies, state and federal (*N. Y. Uncon. Laws*, §1108). There is no provision for court review under the rules of evidence, or any other rules, as the findings of the State Civil Service Commission are conclusive and final, and not subject to review

in any court (*N. Y. Uncon. Laws*, §1106). Dismissal proceedings are not restricted by the rules of evidence or the procedure prevailing in the courts, and a finding of doubtful trust and reliability authorizing discharge

> "may be based upon evidence of the previous conduct of the applicant, eligible, officer, or employee, as the case may be, which may include to the extent deemed appropriate, but shall not be limited to evidence of (a) previous unauthorized disclosure of confidential information; (b) the commission or attempt to commit an act or acts designed to or tending to undermine, sabotage, hamper or obstruct a program adopted by the agency or department by which he is employed or which affects the security or defense of the nation and the state; (c) treasonable or seditious conduct; and (d) membership in any organization or group found by the state civil service commission to be subversive." *N. Y. Uncon. Laws*, §1107.

This statute's wholesale invasion of Lerner's constitutional rights can be justified, if at all, only by a clear public interest, threatened—not doubtfully or remotely—but clearly and immediately. See, *Thomas* v. *Collins*, 323 U. S. 516, 530. A rational connection between the legislative remedy and the evil sought to be curbed, which in other contexts might support legislation against "due process" attack, will not suffice here. See *Herndon* v. *Lowry*, 301 U. S. 242, 258. But in any event, not only is New York's restriction of appellant's liberties unjustified by any clear public interest, immediately threatened,—there is no rational or any other connection between the remedy provided by the statute (as construed below) and the safeguarding of "the security or defense of the nation and the state."

The holding of the Court of Appeals sustaining respondents' decision to discharge Lerner in the name of a reason which simply did not apply to a civil servant whose "primary duties [consist] of opening and closing subway car doors" was patently arbitrary in the very sense of this Court's holding in *Wieman* v. *Updegraff*, 344 U. S. 183, 192.

The Court of Appeals held Lerner's dismissal valid, stating that if he "were a member of the Communist conspiracy he would, as an employee of the transit system in charge of a train, as conductors are, be a very real threat to the State and to the City" (R. 61). How, the Court of Appeals did not state. This suggestion was as irrelevant as it was bizarre. Lerner was not discharged with being a saboteur, and as such he could have been no more dangerous to the New York City transit system than a private citizen who has the price of a subway token. The only way appellant could have constituted a threat to the security of the state and city was if he intentionally sabotaged the subway system in time of emergency. In other words, if Lerner were disloyal, there was an exceedingly remote possibility that he might cause panic in the subway system during an air raid in New York. But respondents concede that there is no suggestion as to Lerner's disloyalty. They suggest only that he may be of "doubtful trust and reliability" because he invoked his constitutional privilege to refuse to answer the question whether he was a member of the Communist Party (R. 63). And this Court has condemned "the practice of imputing a sinister meaning to the exercise of a person's constitutional right under the Fifth Amendment." *Slochower* v. *Board of Education*, 350 U. S. 551, 557.

The problem of personnel security where an employee may in fact have access to secrets, or be able to influence policy against the interests of his own country, is real,[2] and we do not minimize the government's difficulty in handling it. But the problem of balancing the demands of "security" and the "rights of the individual citizen" has always plagued government officials. See, *Duncan* v. *Kahanamoku*, 327 U. S. 304. The hypothetical situation enunciated by the Court of Appeals adopts the concept of "total security," and thus rejects the very essence of the "security or defense of the [United States] and the state," embracing instead the security concept of some totalitarian government. See, Laswell, *National Security and Individual Freedom*, 23-75 (1950). According to Miss Eleanor Bontecou, perhaps the leading writer in the field:

> "The security question arises and the judgment on it is made only in connection with positions which are classed as 'sensitive'; that is, where an employee may in fact have access to secrets, or be able to influence policy against the interests of his own country. A security judgment is a relative one. Some positions are more sensitive than others, and the more important the secret to which an employee may have access the stricter must be the tests applied." *"The Federal Loyalty-Security Program"* 48-49 (1953).[3]

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[2] See, *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U. S. 123, 181-182 (Douglas, J., concurring).

[3] See also: *Fitzgerald* v. *Sperry Gyroscope Co.*, 22 L. A. 186, aff'd 283 App. Div. 1036; *Sperry Gyroscope Co.* v. *Engineers Association*, 106 N. Y. S. 2d 597, 599, rev'd on other grounds, 278 App. Div. 630, aff'd 304 N. Y. 582; *Fitzgerald* v. *City of Philadelphia*, Penn. Comm. Pleas Court, No. 6212, Sept. Term, 1952, "*New York Times*," May 5, 1953, aff'd 376 Pa. 379, 102 A. 2d 887. The non-

While there is no question that a disloyal employee whose work involves classified data, the formulation of a foreign policy, or who is somehow situated so as to work a particular leverage to do harm to the nation or community, is a "security risk," a subway conductor whose job consists of opening and closing subway doors, and who invokes his privilege against self-incrimination when asked whether he is a member of the Communist Party, presents no rational risk to the safety of either the nation or the state. Mr. Justice Steuer, of the New York Supreme Court, put it this way:

> "It is a bit difficult to visualize how a wash room attendant in his official capacity can give aid to his country's enemies." *Application of Pinggera*, 206 Misc. 615, 134 N. Y. S. 2d 166, 168.

If Lerner were disloyal, it is conceivable that he might cause harm to the New York City transit system in time of emergency, but so could any one of millions of residents of the City of New York who ride the subway system daily. The hypothetical fear of New York's Court of Appeals was completely rejected in *Parker* v. *Lester* (9 Cir.), 227 F. 2d 708, where the Ninth Circuit stated:

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judicial authorities are in accord: Bontecou, *supra*, at pp. 48-49; Brown, "*The Operation of Personnel Security Programs*," ANNALS, American Academy of Political and Social Science (1955), pp. 77-78; Goldbloom, "*American Security and Freedom*" (New York, 1954), pp. 32-34; "*Loyalty in a Democracy*," *Public Affairs Pamphlet No.* 179 (New York, 1952), at p. 6; Emerson and Helfeld, "*Loyalty Among Government Employees*," 58 Yale L. J. 1, 136-137; Jahoda and Cook, "*Security Measures and Freedom of Thought*," 61 Yale L. J. 295, 300-301; XI, *Bull. of Atom. Scientists*, April, 1955, pp. 110-11, 121, 146, 163.

"It cannot be said that in view of the large problem of protecting the national security against sabotage and other acts of subversion we can sacrifice and disregard the individual interest of these merchant seamen because they are comparatively few in number. It is not a simple case of sacrificing the interests of a few to the welfare of the many. In weighing the considerations of which we are mindful here, we must recognize that if these regulations may be sustained, similar regulations may be made effective in respect to other groups as to whom Congress may next choose to express its legislative fears. No doubt merchant seamen are in a sensitive position in that the opportunties for serious sabotage are numerous. If it can be said that a merchant seaman notwithstanding his being on board might sink the ship loaded with munitions for Korea, it is plain that many persons other than seamen would be just as susceptible to security doubts. The enginemen and trainmen hauling the cargo to the docks, railroad track and bridge inspectors, switchmen and dispatchers, have a multitude of opportunities for destruction. Dangerous persons might infiltrate the shipping rooms of factories where the munitions are being packed for shipment to Korea with opportunities for inserting bombs appropriately timed for explosion on board ship. All persons who are in factories making munitions and material for the armed forces have opportunities for sabotage, and the same may be said of all operators of transportation facilities, not to mention workers upon the docks. * * * In the event of war we may have to anticipate Black Tom explosions on every waterfront, poison in our water systems, and sand in all important industrial machines. But the time has not come when we have to abandon a system of liberty for one modeled on that of the Communists. Such a system was not that

ordained by the framers of our Constitution. It is the latter we are sworn to uphold." *Id.*, at p. 721.

It is because the "security or the defense of the [United States] and the state" weighs "individual rights" in relation to the "national safety" that this Court held that the term "national security" as used in Public Law 733, 81st Congress, "was intended to comprehend only those activities of the Government that are directly concerned with the protection of the Nation from internal subversion and foreign aggression, and not those which contribute to the strength of the Nation only through their impact on the general welfare. * * * There is an obvious justification for the summary suspension power where the employee occupies a 'sensitive position' in which he could cause serious damage to the national security. * * * On the other hand, it is difficult to justify summary suspensions and unreviewable dismissals on loyalty grounds of employees who are not in 'sensitive positions' and who are thus not situated where they could bring about any discernable adverse acts on the Nation's security. In the absence of an immediate threat of harm to the 'national security' the normal dismissal procedures seem fully adequate and the justification for summary powers disappears. We will not lightly assume that Congress intended to take away [procedural] safeguards in the absence of some overriding necessity, such as exists in the case of employees handling defense secrets." See, *Cole* v. *Young*, 351 U. S. 536, at pp. 546-547.

Since respondents can advance no rational explanation as to how a subway conductor who invokes his constitutional

privilege when asked whether or not he was a member of the Communist Party can endanger the "security or defense of the nation and the state" (as distinguished from the "general welfare"), New York's Security Risk Law, as construed by the Court of Appeals, is patently arbitrary and capricious. See, *e.g.*, *Report of the Special Committee on the Federal Loyalty-Security Program of the Association of the Bar of the City of New York*, 141-149 (1956). The importance of the prohibition against arbitrariness is particularly emphasized in the case of public servants discharged as "security risks." In *Wieman* v. *Updegraff*, 344 U. S., at p. 191, and in *Cole* v. *Young*, 351 U. S., at pp. 546-547, this Court noted the deep and lasting stigma attaching to persons dismissed from public service for such reasons. In *Peters* v. *Hobby*, 349 U. S. 331, it stated that "substantial rights affecting the lives and property of citizens are at stake." *Id.*, at p. 347. They are at stake here, too.

II

Appellant's Discharge, Based Solely on His Invocation of the Privilege Against Self-Incrimination, Was "Arbitrary Action."

The dissent of Judge Fuld in the Court of Appeals points out that the Security Risk Law imposes no absolute duty upon state or city employees to answer questions relating to their official conduct as a condition of retention in employment, but authorizes dismissal only upon "evidence that the particular officer or employee" is of such "doubtful trust and reliability" as to endanger the "security" or "defense" of the nation and the state. "The

narrow issue here presented, therefore, is whether the appellant's exercise of his constitutional right to remain mute may serve as the basis for inferring the existence of the facts prescribed by the statute as a condition of discharge" (R. 67).

This case does not present the question whether the invocation of the privilege against self-incrimination prohibits the federal or state government from discharging a public servant from a position in which he has access to classified defense information, or where he can influence policy against the interest of his own country, or where he can assert some serious leverage in aid of his country's enemies. This case involves an employee whose primary functions consist of opening and closing subway doors. While we would assert that no inference of doubtful trust and reliability can arise from the invocation of the privilege in any circumstances, that question is not presented here. The question presented is whether the state can transform the exercise of a constitutional privilege into an admission of guilt merely because it arbitrarily asserts that the "security or defense of the nation and the state" is involved.

In *Slochower* v. *Board of Education*, 350 U. S. 551, this Court was careful to point out that the state has broad powers in the selection and discharge of its employees, and that it may be that proper inquiry would show that Slochower's continued employment was inconsistent with the real interests of the state, "but there has been no such inquiry here." *Id.*, at p. 559. In the case at bar Lerner was found to be "of doubtful trust and reliability," if not actually disloyal, only because he refused to answer questions re-

lating to his possible association with a subversive organization. The dissent of Judge Fuld in the Court of Appeals points up the heavy hand with which this statute was applied to appellant:

> "Whether, however, the refusal be taken as an admission of his membership in such organization or merely as engendering a doubt as to his reliabilty, the fact remains that in either instance an adverse, 'sinister' inference, fraught with serious consequences, is attempted to be drawn from the invocation of the constitutional privilege. Based as it was solely upon his exercise of the privilege, the appellant's discharge constitutes 'arbitrary action' within *Slochower*, regardless of the formal difference in the labels employed. Any other conclusion would be strange indeed: to treat reliance upon a fundamental constitutional guarantee as proof of 'untrustworthiness and unreliability' is anomalous, a veritable contradiction in terms. * * * There is ever a need to achieve a balance between government security and the traditional rights of the individual. That balance has been destroyed by the way in which the statute before us has been applied. It is a delusion to think that the nation's security is advanced by the sacrifice of the individual's basic liberties. The fears and doubts of the moment may loom large, but we lose more than we gain if we counter with a resort to alien procedures or with a denial of essential constitutional guarantees." (R. 69)

We think it clear that New York's "Security Risk Law" as construed by the court below, is interdicted by this Court's holding in *Slochower* v. *Board of Education, supra.*

CONCLUSION

By reason of the foregoing, the decision of the Court below should be reversed.

Respectfully submitted,

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